



## Office of the Secretary

### 14 CFR Part 399

[Docket No. DOT-OST-2021-0142]

RIN 2105-AF18

#### Clarification of Formal Enforcement Procedures for Unfair and Deceptive Practices

**AGENCY:** Office of the Secretary (OST), U.S. Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** The U.S. Department of Transportation (Department or DOT) is amending its regulations regarding the formal enforcement procedures that are available if the DOT's Office of Aviation Consumer Protection (OACP) takes enforcement action against an airline or ticket agent, and efforts to settle the matter through a consent order are unsuccessful. Consistent with existing law, this final rule clarifies that DOT may bring a civil action in a United States District Court.

**DATES:** Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Robert Gorman, Kimberly Graber, or Blane Workie, Office of Aviation Consumer Protection, U.S. Department of Transportation, 1200 New Jersey Ave. SE., Washington, D.C., 20590, 202-366-9342, 202-366-7152 (fax); [robert.gorman@dot.gov](mailto:robert.gorman@dot.gov); [kimberly.graber@dot.gov](mailto:kimberly.graber@dot.gov); [blane.workie@dot.gov](mailto:blane.workie@dot.gov) (e-mail).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

###### *A. The Unfair and Deceptive Practices Statute and the Department's Related Rulemakings*

The Department's authority to regulate unfair and deceptive practices in air transportation or the sale of air transportation is found at 49 U.S.C. 41712 (section 41712) in conjunction with its rulemaking authority under 49 U.S.C. 40113, which states that the Department may take action that it considers necessary to carry out this part, including

prescribing regulations. Section 41712 gives the Department the authority to investigate and decide whether an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice in air transportation or the sale of air transportation. Under section 41712, after notice and an opportunity for a hearing, the Department has the authority to issue orders to stop an unfair or deceptive practice.

On December 20, 2020, the Department published in the *Federal Register* a final rule titled “Defining Unfair or Deceptive Practices” (UDP Final Rule).<sup>1</sup> The UDP Final Rule was intended to provide regulated entities and other stakeholders with greater clarity about the Department’s enforcement and regulatory processes with respect to aviation consumer protection actions under section 41712.<sup>2</sup> It sets forth procedures that the Department uses when conducting enforcement actions and rulemakings under the authority of section 41712.<sup>3</sup>

On February 2, 2022, the Department amended its regulations regarding the hearing procedures that are available when DOT proposes a discretionary aviation consumer protection rulemaking declaring a practice to be unfair or deceptive.<sup>4</sup> On August 29, 2022, the Department issued an interpretive rulemaking (guidance) to inform the public and regulated entities about DOT’s interpretation of the terms unfair, deceptive, and practices as it relates to its statutory authority to prohibit unfair or deceptive practices.<sup>5</sup>

## **II. Need for Clarification of Formal Enforcement Procedures**

In the UDP Final Rule, the Department stated that when there are reasonable grounds to believe that an airline or ticket agent has violated Section 41712, and efforts to settle the matter have failed, then OACP may issue a notice instituting an enforcement proceeding

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<sup>1</sup> 85 FR 78707 (December 7, 2020); RIN 2105-AE72; Docket DOT-OST-2019-0182.

<sup>2</sup> 85 FR 78707.

<sup>3</sup> 14 CFR 399.79.

<sup>4</sup> 87 FR 5655 (February 2, 2022); RIN 2105-AF03; Docket DOT-OST-2021-0142.

<sup>5</sup> 87 FR 52677 (August 29, 2022); RIN 2105-ZA18; Docket DOT-OST-2019-0182.

before a DOT administrative law judge (ALJ).<sup>6</sup> However, the ALJ complaint process is not the only avenue available for taking formal enforcement action. Pursuant to existing law, DOT also has the option of filing a complaint in a United States District Court to enforce Section 41712, or any regulation, requirement, or order issued under the authority of Section 41712.<sup>7</sup> In the UDP Final Rule codifying the Department's formal enforcement procedures, the option to file a complaint in United States District Court was not listed. This final rule is intended to clarify and provide a more complete statement of formal enforcement procedures available under existing DOT authority.

### **III. Administrative Procedure Act**

Section 553 of the Administrative Procedure Act (5 U.S.C. 553) provides that when an agency, for good cause, finds that notice and public comment are impractical, unnecessary, or contrary to the public interest, the agency may issue a final rule without providing notice and an opportunity for public comment (5 U.S.C. 553(b)(B)). The Department has determined that there is good cause to issue this final rule without notice and an opportunity for public comment because such notice and comment would be unnecessary. Since this final rule only restates and clarifies existing legal authorities without imposing any new requirements, public comment is unnecessary.

### **Rulemaking Analyses and Notices**

#### *A. E.O. 12866 and DOT Regulatory Policies and Procedures*

The Office of Management and Budget (OMB) has not designated this rule a significant regulatory action under section 3(f) of Executive Order 12866 ("Regulatory Planning and Review"). Accordingly, OMB has not reviewed it. The Department does not anticipate that this rulemaking, which amends the Department's internal procedures, will have an economic impact on regulated entities. E.O. 12866, as amended by E.O. 14094

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<sup>6</sup> 14 CFR 399.79(f).

<sup>7</sup> 49 U.S.C. § 46106; 49 U.S.C. § 46107.

(“Modernizing Regulatory Review”), requires that agencies “should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.” The Department does not anticipate that this action will result in any costs because it is simply a clarification of existing legal authorities and, therefore, is not expected to change the behavior of regulated parties or how they interact with the Department. The primary benefit of this rulemaking is providing clarification regarding the legal authorities applicable to the Department’s enforcement practices.

#### *B. Regulatory Flexibility Act*

Since notice and comment rulemaking is not necessary for this rule, the analytical provisions of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612) do not apply.

#### *C. Executive Order 13132 (Federalism)*

Executive Order 13132 requires agencies to ensure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (August 4, 1999), and DOT has determined that this action will not have a substantial direct effect or federalism implications on the States and would not preempt any State law or regulation or affect the States' ability to discharge traditional State governmental functions. Therefore, consultation with the States is not necessary.

#### *D. Executive Order 13175 (Tribal Consultation)*

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” Because this rulemaking does not significantly or uniquely affect the communities of the Indian tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13175 do not apply.

#### *E. Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 et seq.) requires that DOT consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of PRA section 3507(d), obtain approval from the Office of Management and Budget (OMB) for each collection of information it conducts, sponsors, or requires through regulations. The DOT has determined there are no new information collection requirements associated with this final rule.

#### *F. National Environmental Policy Act*

The agency has analyzed the environmental impacts of this action pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, “Procedures for Considering Environmental Impacts” (44 FR 56420, October 1, 1979). Categorical exclusions are actions identified in an agency’s NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). Paragraph 4.c.6.i of DOT Order 5610.1C categorically excludes “[a]ctions relating to consumer protection, including regulations.” This rulemaking relates to the Department’s authority to pursue a complaint in United States District Court on consumer protection matters. The agency does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

#### **List of Subjects in 14 CFR Part 399**

Consumer protection, policies, rulemaking proceedings, enforcement, unfair or deceptive practices.

For the reasons set forth in the preamble, the Department of Transportation amends 14 CFR part 399 as follows:

#### **PART 399 -- STATEMENTS OF GENERAL POLICY**

1. The authority citation for part 399 is revised to read as follows:

**Authority:** 49 U.S.C. 40113(a), 41712, 46106, and 46107.

2. Amend § 399.79 by revising the paragraph (f) heading and by adding paragraph (g) to read as follows:

**§ 399.79 Policies relating to unfair and deceptive practices.**

\* \* \* \* \*

(f) *Formal enforcement proceedings before an administrative law judge.* \* \* \*

(g) *Formal enforcement proceedings in U.S. District Court.* Alternatively, when there are reasonable grounds to believe that an airline or ticket agent has violated 49 U.S.C. 41712 and efforts to settle the matter have failed, the Department of Transportation may bring a civil action in a district court of the United States pursuant to 49 U.S.C. 46106 or 46107.

Issued this 12th day of June, 2023, in Washington, D.C., under authority delegated in 49 CFR 1.27(n).

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John E. Putnam,  
General Counsel.

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